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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 346

JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS.

ALBERT H. VEEDER,
FRANCIS E. BALDWIN,
33 South Clark Street,
Chicago, Illinois,
Attorneys for Petitioners.

THE BLAKELY-WARREN PRINTING COMPANY, 212 WEST JACKSON, CHICAGO

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INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Statement of the Case	2
Statute	7
Errors Assigned	7
Questions Presented	8
Summary of Argument	9
Argument:	
I. The decision of the Court below is in conflict with the decisions of the United States Circuit Courts of Appeals for the First and Second Circuits	11
II. The Court below erred in construing the applicable statute because the Court failed to recognize that the controlling words in the statutory phrase "at the time of the distribution to the taxpayer" are the words "to the taxpayer"	12
III. The words "distribution to the taxpayer", as used in the third sentence of § 113 (a) (5) of the Revenue Act of 1928, mean "delivery to the taxpayer"	14
IV. The statute is clear and is not ambiguous	16
V. The principles of statutory construction applicable to this case are firmly established by numerous decisions of this Court	19
VI. The legislative history relating to the enactment of § 113 of the Revenue Act of 1928 sustains the position of the taxpayer	21
VII. Property purchased by testamentary trustees and distributed to the taxpayer was acquired by the taxpayer by will	25
Conclusion	30
Appendix	31

TABLE OF CASES CITED.

Brewster v. Gage, 280 U. S. 327, 30 F. (2d) 604, 605 (C. C. A. 2d) 14, 21, 22, 23

Caminetti v. United States, 242 U. S. 470, 490 27

Colorado National Bank of Denver v. Bedford, 310 U. S. 41 13

Commissioner of Internal Revenue v. Campbell, Marjorie K., 112 F. (2d) 530 (C. C. A. 2d) 11, 17, 18

Commissioner of Internal Revenue v. Gambrill, Richard Van Nest, 112 F. (2d) 530 (C. C. A. 2d) 11, 13, 17, 18, 28, 29

Commissioner of Internal Revenue v. Knox, Seymour H., 112 F. (2d) 530 (C. C. A. 2d) 11, 17, 18

Commissioner of Internal Revenue v. Libbey, Alla A., 100 F. (2d) 458, 460, 461 (C. C. A. 1st) 11, 13, 17

Commissioner of Internal Revenue v. Rogers, Dorothy K., 112 F. (2d) 530 (C. C. A. 2d) 11, 17, 18

Crooks v. Harrelson, 282 U. S. 55 19

Dibblee v. Commissioner of Internal Revenue, 75 F. (2d) 617 (C. C. A. 9th) 15

First National Bank of Boston, et al., Trustees under Will of Blodgett v. United States, 76 F. (2d) 200 C. C. A. 1st) 15

First Trust and Savings Bank v. Smietanka, Collector, 268 F. 230, 233 16

Fleming v. Commissioner of Internal Revenue, 36 B. T. A. 773, 777 28

Hamilton v. Rathbone, 175 U. S. 414, 419 20

Harbison, Ralph W., v. Commissioner of Internal Revenue, 26 B. T. A. 896 24

Haskell v. Commissioner of Internal Revenue, 78 F. (2d) 869, 870 (C. C. A. 3d) (cert. den. 296 U. S. 652) 12, 13, 17

Helvering v. City Bank Farmers Trust Co., 296 U. S. 85, 89 20
Helvering v. Gowran, 302 U. S. 238, 241-242 19
Jenkins, et al. v. Smith, Collector, 21 F. Supp. 433 18
Lee v. Commissioner of Internal Revenue, 76 F. (2d) 203 (C. C. A. 1st) 15
Lewellyn v. Harbison, 31 F. (2d) 740 (C. C. A. 3d) (cert. den. 280 U. S. 560) 14
Lucas, Commissioner v. Earl, 281 U. S. 111, 114 20
Lyeth v. Hoey, 305 U. S. 188 28
Mason v. Routzahn, 275 U. S. 175 14
McFeely v. Commissioner of Internal Revenue, 296 U. S. 102 15
Merchants Loan and Trust Co., Trustee v. Smietanka, 255 U. S. 509 16
Ogle v. Helvering, Commissioner of Internal Revenue, 77 F. (2d) 338 (C. C. A. 2d) 15
Old Colony Railway Co. v. Commissioner, 284 U. S. 552, 560 19
Rand v. Helvering, Commissioner of Internal Revenue, 79 F. (2d) 24 (C. C. A. 8th) 15
Reynolds, Richard J., v. Commissioner of Internal Revenue, No. 4641 (decided Oct. 7, 1940) (C. C. A. 4th) 29
Strathearn S. S. Co. v. Dillon, 252 U. S. 348, 354 27
Taft, Trustee v. Commissioner of Internal Revenue, 101 F. (2d) 1007 (C. C. A. 6th) 12, 13, 18
Thompson v. United States, 246 U. S. 547, 551 20
United States v. Merriam, 263 U. S. 179, 187 19
United States v. Van Nostrand, 94 F. (2d) 510, 512 (C. C. A. 1st) 12, 13
White v. Aronson, 302 U. S. 16, 21 20
Willcuts v. Ordway, 19 F. (2d) 917, 918 (C. C. A. 8th) 14
Williamson v. Commissioner of Internal Revenue, 100 F. (2d) 735 (C. C. A. 6th) (cert. den. 307 U. S. 623) 12, 13, 17

STATUTES CITED.

Revenue Act of 1916, c. 463, 39 Stat. at L. 756:
Sec. 2 (b) 16
Revenue Act of 1918, 40 Stat. at L. 1057, c. 18 21
Revenue Act of 1921, 42 Stat. at L. 227, c. 136 21
*Revenue Act of 1928, c. 852, 45 Stat. at L. 791:
Sec. 111 (a) (U. S. C. A. Title 26, page 376) 7, 31
Sec. 112 (U. S. C. A. Title 26, pages 377-80) 14
Sec. 113 (a) (5) (U. S. C. A. Title 26, pages 380-1) 4, 5, 7, 8, 9, 11, 12, 13, 14, 15, 17, 20, 22, 23, 24, 26, 31
Sec. 113 (a) (9) (U. S. C. A. Title 26, page 382) ... 14
Sec. 113 (b) (1) (U. S. C. A. Title 26, page 383) ...7, 31
Sec. 113 (b) (2) (U. S. C. A. Title 26, page 383) ...7, 32
Sec. 115 (U. S. C. A. Title 26, pages 384-6) 14
Sec. 161 (U. S. C. A. Title 26, page 405) 14
Sec. 162 (U. S. C. A. Title 26, pages 405-6) 14
Sec. 165 (U. S. C. A. Title 26, page 407) 14
Sec. 167 (U. S. C. A. Title 26, page 407) 14
Sec. 182 (U. S. C. A. Title 26, pages 408-9) 14
Sec. 701 (a) (1) (U. S. C. A. Title 26, page 466).7, 13, 32
Sec. 701 (a) (13) (U. S. C. A. Title 26, page 467) 7, 13, 32
*Revenue Act of 1932, c. 209, 47 Stat. at L. 169:
Sec. 113 (a) (5) (U. S. C. A. Title 26, page 515) 11, 12, 18, 23, 24
*Revenue Act of 1934, c. 277, 48 Stat. at L. 683:
Sec. 113 (a) (5) (U. S. C. A. Title 26, pages 696-7) 22, 23, 24, 25, 29
Judicial Code, 43 Stat. at L. 938:
Sec. 240 (28 U. S. C. A. § 347, pp. 359-360) 1

* Reference: U. S. C. A. Title 26, Internal Revenue Acts, 1924 to Date.

MISCELLANEOUS.

General Counsel's Memorandum 11309, Internal Revenue, Cumulative Bulletin, XII-1, p. 126 24

General Counsel's Memorandum 14893, Internal Revenue, Cumulative Bulletin, XIV-1, p. 202 24

Conference Committee Report No. 1882, 70th Cong., 1st Sess., Internal Revenue, Cumulative Bulletin 1939-1 (Part 2) pp. 444, 447 27

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House Committee Report No. 704, 73rd Cong., 2nd Sess., Internal Revenue Cumulative Bulletin 1939-1 (Part 2) pp. 554, 575 ..... 22, 24

Senate Report No. 558, 73rd Cong., 2nd Sess., Internal Revenue Cumulative Bulletin 1939-1 (Part 2) pp. 586, 612 ..... 22, 24

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS.

Opinion Below.

The opinion of the United States Circuit Court of Appeals (7th Circuit) (R. 68-75) is reported at 111 F. (2d) 843.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals (7th Circuit) was entered on March 5, 1940, and petition for rehearing filed by the Petitioners herein was denied on May 21, 1940. The petition for certiorari was filed August 17, 1940, and was granted on October 14, 1940. The Jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended, 43 Stat. at L. 938 (U. S. C. A. Title 28, § 347).

Statement of the Case.

The facts herein are not in dispute and have been stipulated (R. 14-30). They may be summarized as follows:

Gustavus F. Swift died on March 29, 1903, leaving nine children surviving him, one of whom died in 1911. Ann M. Swift, the widow of Gustavus F. Swift, died on May 19, 1922 (R. 32). The Petitioner, Ruth Swift Maguire (*hereinafter sometimes called the "taxpayer"*) is one of the eight children of Gustavus F. Swift who were surviving on March 1, 1913, and also on March 29, 1923 (R. 15, 16).

Gustavus F. Swift, by his last will and testament, after devising and bequeathing to his widow certain real estate on which the family residence stood, together with all household furniture and other property used in connection with said residence, devised and bequeathed, generally and not specifically, to Louis F. Swift, Edward F. Swift and Edward Tilden, as executors and trustees, the residue of his estate. The will directed the executors and trustees to make certain payments annually commencing with the date of the testator's decease and continuing until the final distribution of the estate, and, after payment of all debts of decedent, to make certain partial distributions to members of decedent's family and other relatives. By clause 8 of said will, the executors and trustees were further directed:

> "to make a final distribution of all the rest and residue of my estate among my wife and children, at any time in their judgment and discretion after the expiration of ten (10) years from and after the date of my decease, but not before, and in any event, not later than twenty (20) years thereafter, giving to my wife the one-third part thereof, the balance to be divided among my children, share and share alike, and should my wife not be living at the time of such distribution, then the same shall be divided equally among my children, share and share alike, the descendants of any deceased children in such distribution to take the proportion of their deceased parent" (R. 25, 26).

On December 11, 1905, the Probate Court of Cook County, Illinois, entered an order approving the final account of the executors of the Estate of Gustavus F. Swift, and directing the executors to turn over to themselves, as trustees, the remainder of the estate in their hands, which they did on that date (R. 16). On March 29, 1923, the personal property thus received by the testamentary trustees from the executors of the Estate of Gustavus F. Swift, together with other personal property purchased subsequently by the testamentary trustees, was distributed by them in kind to the eight children of said Gustavus F. Swift who were then surviving, including the taxpayer (R. 34, 35). This personal property consisted of shares of the capital stock of certain corporations and bills and accounts receivable. By agreement between the taxpayer and her co-beneficiaries, the testamentary trustees under the will of Gustavus F. Swift delivered all of said property to the trustees of two *inter vivos* trusts, Union Terminal Trust and Swift Family Realty Trust, which the taxpayer and her co-beneficiaries had created for the purpose of selling said properties and distributing the proceeds thereof to the taxpayer and her co-beneficiaries under the will of Gustavus F. Swift. The property was sold by the two trusts in 1929 and 1930 (R. 34, 35).

On March 13, 1933, the Commissioner of Internal Revenue asserted a deficiency in income tax of Petitioners for the calendar year 1930 in the amount of $71,429.62 (R. 8). In determining the amount of the deficiency, the Commissioner used, as the bases for computing gain on the sale of the personal property distributed by the testamentary trustees to the taxpayer as a residuary legatee under the will of her father, Gustavus F. Swift, (1) the fair market value on December 11, 1905, or the March 1, 1913, value, whichever was greater, of such property as was received by the testamentary trustees from the executors of Gustavus F. Swift and (2) the cost of personal

property purchased by the testamentary trustees and by them distributed to the taxpayer and her co-beneficiaries on March 29, 1923 (except that the March 1, 1913, value of property purchased before that date was said to control if it exceeded cost).

The Commissioner at the same time asserted a deficiency in income tax for the calendar year 1930, calculated upon the same bases, against each of the other seven surviving beneficiaries of the testamentary trust created by the will of Gustavus F. Swift. Petitioners and the seven other beneficiaries contested the asserted deficiencies before the United States Board of Tax Appeals, claiming that there had been no distribution to them under Section 113 (a)(5) of the 1928 Revenue Act until March 29, 1923, when they received the property here involved from the testamentary trustees (R. 14, 15).

On January 28, 1939, the Board of Tax Appeals rendered its memorandum findings of fact and opinion in the cases before it, known as *Jeremiah D. Maguire and Ruth S. Maguire, Petitioners* v. *Commissioner of Internal Revenue, Respondent,* B. T. A. Docket No. 72216, and of *Harold H. Swift, Gustavus F. Swift, Charles H. Swift, Charles H. Swift, et al., Executors, Estate of Edward F. Swift, Deceased, Louis F. Swift, Jr., et al., Executors, Estate of Louis F. Swift, Deceased, Helen Swift Neilson,* and *George H. Swift, Petitioners* v. *Commissioner of Internal Revenue, Respondent,* B. T. A. Docket Nos. 90338 to 90344, both inclusive. On March 29, 1939, the Board of Tax Appeals made its decision in B. T. A. Docket No. 72216, holding that the property involved herein was distributed to taxpayer on March 23, 1923, and that there was a deficiency in income tax of Petitioners for the calendar year 1930 in the amount of $46,433.60, which is admitted by Petitioners to be correct (R. 31-47).

In deciding this case, and the related cases, the Board of Tax Appeals found that

"the language of the statute above quoted, however,

> is clear and unambiguous. The basis laid down by the statute is 'the fair market value of the property at the time of the distribution to the taxpayer.' * * * The testamentary trust was not the taxpayer. The taxpayers are the petitioners herein, or their decedents, to whom the assets were distributed by the testamentary trustees on March 29, 1923 * * *.
>
> "Upon authority of the cited cases we hold that the time of the distribution to the taxpayers of the property which they acquired from the residuary trust estate created by the will of their father was the time at which it was distributed to them by the testamentary trustees upon termination of the trust estate on March 29, 1923" (R. 38, 39).

On June 21, 1939, Respondent filed in the United States Circuit Court of Appeals for the Seventh Circuit under its No. 7049 his petition for review and assignments of error in this case (R. 48-53) and in the cases of the other seven beneficiaries of the testamentary trust. On July 7, 1939, the Circuit Court of Appeals, upon the joint motion of the Commissioner of Internal Revenue and the Respondents in each of the eight cases, entered an order herein providing as follows:

> "5. In the event that application shall be made by either party to the Supreme Court of the United States for a writ of certiorari in the said case of *Guy T. Helvering, Commissioner of Internal Revenue, Petitioner on Review* v. *Jeremiah D. Maguire and Ruth S. Maguire, Respondents on Review*, then pending final disposal of said case by the Supreme Court no Order for Mandate or Mandate shall issue in any of the other seven cases, and upon final disposition of said case by the Supreme Court, an Order for Mandate and Mandate similar to those which may be made and issued by this Court in the said Maguire case shall be made and issued by the Court in each of the said other cases" (R. 55, 56).

The principal issue in the Circuit Court of Appeals was the construction to be placed upon the words "at the time of the distribution to the taxpayer", as those words are used in the third sentence of § 113 (a) (5) of the Revenue Act of 1928 in determining the proper basis for computing

the gain to the taxpayer from the sale of the personal property delivered to her on March 29, 1923, by the testamentary trustees and sold by the trustees of Union Terminal Trust in the calendar year 1930, and by the trustees of Swift Family Realty Trust in the calendar year 1929. Sixty per cent of the gain from the sale made in 1929 by the Swift Family Realty Trust is taxable in the calendar year 1930. Income taxes for the calendar year 1929 are not in dispute. Petitioners and Respondent have stipulated that the beneficiaries of the testamentary trust, Ruth Swift Maguire, Harold H. Swift, Gustavus F. Swift, Charles H. Swift, Edward F. Swift, Louis F. Swift, Helen Swift Neilson, and George H. Swift, are taxable as though the sales made were made by said beneficiaries individually (R. 19, 20, 21).

Petitioners and respondent have stipulated the amount of taxable gain if the proper basis of all such personal property so sold is the fair market value thereof on March 29, 1923, when the property was delivered by the testamentary trustees to the beneficiaries of the trust, which Petitioners contend was "the time of the distribution to the taxpayer". They have also stipulated the amount of taxable gain if the proper bases were: (1) as to property received by the testamentary trustees from the executors of Gustavus F. Swift, the fair market value thereof on December 11, 1905, or on March 1, 1913, whichever was greater; and (2) as to property purchased by the testamentary trustees, the cost thereof to them (except that the March 1, 1913, value of property purchased before that date should control if it exceeded cost) (R. 19, 20, 21).

The decision of the Circuit Court of Appeals herein sustained the contentions of the Commissioner of Internal Revenue as to the bases for computing gain on the sale of the personal property involved herein, reversed the order of the Board of Tax Appeals, and remanded the cause for further proceedings not inconsistent with the

views expressed in the opinion of the Circuit Court of Appeals (R. 68-75).

The Circuit Court of Appeals held that the phrase "time of the distribution to the taxpayer", as used in § 113 (a) (5) of the 1928 Act, means "time of distribution by the decedent's estate, and it follows consequently that the time of such distribution in the instant case was December 11, 1905. Moreover, the basis of the property coming to the taxpayer from the executors, through the testamentary trustees, is the 1905 value or the 1913 value of such property, whichever was greater. § 113 (b)" (R. 73).

As to property purchased by the testamentary trustees and distributed to the taxpayer on March 29, 1923, the court concluded that such property was not property transmitted at death, that it was acquired by the taxpayer by purchase and not by will, and that as to it, the taxpayer's basis was the cost to the testamentary trustees or the March 1, 1913 value, whichever was greater (R. 74, 70).

Statute.

§ 111 (a), § 113 (a) (5), § 113 (b) (1) and (2), and § 701 (a) (1) * * * (13) of the Revenue Act of 1928, (c. 852, 45 Stat. at L. 791) contain the applicable provisions of the statute (Appendix, *infra*).

Errors Assigned.

The errors assigned and urged are:

(1) *The decision of the Circuit Court of Appeals is erroneous in holding "that the phrase 'time of distribution to the taxpayer' as used in § 113 (a) (5) of the 1928 Act means time of distribution by the decedent's estate, and it follows consequently that the time of such distribution in the instant case was December 11, 1905. Moreover, the basis of the property coming to the taxpayer from the executors, through the testamentary trustees, is the 1905 value or the 1913 value of such property, whichever was greater § 113 (b)"* (R. 73).

(2) *The decision of the Circuit Court of Appeals*

is erroneous in holding that property purchased by testamentary trustees and by them distributed to the taxpayer is property acquired by the taxpayer "by purchase" and not "by will" and that taxpayer's basis therefor is the cost to the trustees, or the value thereof on March 1, 1913, whichever was greater. (R. 74).

Questions Presented.

The principal contested issue herein is the construction to be given to the term "the time of the distribution to the taxpayer", as used in the third sentence of § 113 (a) (5) of the Revenue Act of 1928, Chapter 852, 45 Stat. at L. 791, in determining the proper basis for computing the gain of the taxpayer Ruth Swift Maguire from the sale of personal property acquired by her by general bequest under the will of her father, Gustavus F. Swift.

Petitioners have contended and here contend that the term "at the time of the distribution to the taxpayer" refers to the time of delivery to the taxpayer and that the proper basis for determining taxpayer's gain from the sale of the property here involved was its fair market value on March 29, 1923, when the testamentary trustees under the will of Gustavus F. Swift delivered such property to the taxpayer, Ruth Swift Maguire.

Respondent contends (1) that as to such of said property as was distributed by the executors of the will of Gustavus F. Swift, deceased, to themselves as testamentary trustees on December 11, 1905, and by them delivered to the taxpayer, Ruth Swift Maguire, on March 29, 1923, the proper basis is the fair market value of such property on December 11, 1905, or on March 1, 1913, whichever was greater; and (2) that as to such of said property as was purchased by the testamentary trustees subsequent to December 11, 1905, and distributed to the taxpayer on March 29, 1923, the taxpayer's proper basis is the cost to the testamentary trustees or its March 1, 1913, value, if it exceeded the cost.

SUMMARY OF ARGUMENT.

I.

The decision of the Court below is in direct conflict with decisions of the United States Circuit Courts of Appeals for the First and Second Circuits, which decided the specific question here involved. It also conflicts in principle with decisions of the Third and Sixth Circuit Courts of Appeals which hold that the term "distribution to the taxpayer" means "delivery to the taxpayer."

II.

The Court below erred in construing the applicable statute, because the Court failed to recognize that the controlling words in the statutory phrase "at the time of the distribution to the taxpayer" are the words "to the taxpayer."

III.

The words "distribution to the taxpayer," as used in the third sentence of § 113 (a) (5) of the Revenue Act of 1928, mean "delivery to the taxpayer".

IV.

The statute is clear and is not ambiguous.

V.

The principles of statutory construction applicable to this case are firmly established by numerous decisions of

this Court. The legislators must be presumed to have used words in their known and ordinary signification.

VI.

The legislative history relating to the enactment of § 113 of the Revenue Act of 1928 sustains the position of the taxpayer.

VII.

Property purchased by testamentary trustees and distributed to the taxpayer was acquired by the taxpayer by will.

ARGUMENT.

I.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH DECISIONS OF THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE FIRST AND SECOND CIRCUITS.

The specific questions here involved have been decided contrary to the decision of the Court below by the First Circuit Court of Appeals in *Commissioner of Internal Revenue* v. *Libbey,* 100 F. (2d) 458, and the decision of the Second Circuit Court of Appeals in *Commissioner of Internal Revenue* v. *Richard Van Nest Gambrill,* 112 F. (2d) 530; *Commissioner of Internal Revenue* v. *Marjorie K. Campbell,* 112 F. (2d) 530; *Commissioner of Internal Revenue* v. *Seymour H. Knox,* 112 F. (2d) 530; and *Commissioner of Internal Revenue* v. *Dorothy K. Rogers,* 112 F. (2d) 530.

The *Gambrill* and the *Knox* cases, *supra,* involved the question of the basis for determining gain or loss under § 113 (a) (5) of the Revenue Act of 1928. The *Libbey, Campbell* and *Rogers* cases involved the question of the basis for determining gain or loss under § 113 (a) (5) of the Revenue Act of 1932, which is identical with § 113 (a) (5) of the Revenue Act of 1928. In each of these cases, the property sold was personal property received by general bequest from testamentary trustees, and the Circuit Courts of Appeals which rendered the decisions in these cases held that the term "at the time of the distribution to the taxpayer", as used in § 113 (a) (5) of the applicable Act, refers to the time of delivery of such property to the taxpayer.

The decision of the Court below also conflicts in principle with that of the First Circuit Court of Appeals in *United States* v. *Van Nostrand*, 94 F. (2d) 510 (cited in the *Libbey* case, *supra*); with that of the Third Circuit Court of Appeals in *Haskell* v. *Commissioner*, 78 F. (2d) 869; and with the decisions of the Sixth Circuit Court of Appeals in *Williamson* v. *Commissioner*, 100 F. (2d) 735, and *Taft, Trustee* v. *Commissioner*, 101 F. (2d) 1007.

In the *Van Nostrand* case it was decided that the term "distribution" as used in § 113 (a) (5) of the Revenue Act of 1928 refers to actual delivery to the taxpayer. The *Haskell* case involved the question of the determination, under § 113 (a) (5) of the Revenue Act of 1928, of the amount of loss sustained by the taxpayer from the sale in 1930 of shares of stock acquired, as a legatee under a will, by general bequest. The *Williamson* case involved the determination, under § 113 (a) (5) of the Revenue Act of 1932, of the amount of gain from the sale in 1932 and 1933 of certain stocks which taxpayer had acquired from the estate of her husband, who died intestate. The *Taft* case involved the determination, under § 113 (a) (5) of the Revenue Act of 1928, of the amount of loss sustained from the sale in 1930 of securities by a testamentary trustee to whom the residue of an estate was bequeathed. In all these decisions, the Courts held that the term "distribution to the taxpayer" meant "delivery to the taxpayer."

II.

THE COURT BELOW ERRED IN CONSTRUING THE APPLICABLE STATUTE BECAUSE THE COURT FAILED TO RECOGNIZE THAT THE CONTROLLING WORDS IN THE STATUTORY PHRASE "AT THE TIME OF THE DISTRIBUTION TO THE TAXPAYER" ARE THE WORDS "TO THE TAXPAYER".

The conclusion of the Court below that Congress was not looking beyond the "distribution by the estate" of Gustavus F. Swift, the taxpayer's father (R. 71), and "did not intend the valuation date to go beyond the time when

the estate was closed" (R. 73), ignores the controlling words of the statute "at the time of the distribution to the taxpayer" as used in the third sentence of § 113 (a) (5) of the Revenue Act of 1928.

The meaning of the words "at the time" need not be defined. The words "to the taxpayer" are clear, definite, certain and unambiguous. The property involved was personal property which the taxpayer acquired by general bequest under the will of her father, Gustavus F. Swift.

In applying the statute, the first fact to be determined is the identity of the "taxpayer." The statute (§ 701 (a) (13) of the 1928 Act) provides that:

> "The term 'taxpayer' means any person subject to a tax imposed by this Act,"

whether that "person" be an individual, a trust, an estate, a partnership or a corporation. (§ 701 (a) (1).)

Ruth Swift Maguire is the "person" in this case who is "subject to a tax imposed by this Act." She is the person "ultimately liable for the tax itself". *Colorado National Bank of Denver* v. *Bedford*, 310 U. S. 41. The taxpayer's identity having been established, the plain language of the act eliminates from consideration any "time" except the "time" when the property was distributed to the taxpayer.

Haskell v. *Commissioner*, 78 F. (2d) 869, 870 (C. C. A. 3rd) (cert. den. 296 U. S. 652);

United States v. *Van Nostrand*, 94 F. (2d) 510, 512 (C. C. A. 1st);

Commissioner v. *Libbey*, 100 F. (2d) 458, 460, 461 (C. C. A. 1st);

Williamson v. *Commissioner*, 100 F. (2d) 735 (C. C. A. 6th) (cert. den. 307 U. S. 623);

Taft, Trustee, v. *Commissioner*, 101 F. (2d) 1007 (C. C. A. 6th);

Commissioner v. *Gambrill and Three Other Cases*, 112 F. (2d) 530 (C. C. A. 2nd).

III.

THE WORDS "DISTRIBUTION TO THE TAXPAYER" AS USED IN THE THIRD SENTENCE OF § 113 (a) (5) OF THE REVENUE ACT OF 1928 MEAN "DELIVERY TO THE TAXPAYER."

The word "distribution" was defined in *Willcuts* v. *Ordway*, 19 F. (2d) 917, 918 (C. C. A. 8th), as

> "separation and segregation from the trust estate so that it no longer forms any part or parcel thereof."

This Court, in speaking of the meaning of the word "distribution," as applied to dividends, held that the "date of payment, not the date of the declaration of the dividend, is the date of distribution." *Mason* v. *Routzahn*, 275 U. S. 175. To the same effect is *Lewellyn* v. *Harbison*, 31 F. (2d) 740 (cert. den. 280 U. S. 560), in which the Circuit Court of Appeals (3rd Circuit) held:

> "A distribution made is a completed act. • • • We agree with the Circuit Court of Appeals for the Sixth Circuit that a 'distribution made' means 'dividends paid' and not merely declared."

In every instance where the word "distribute" or the word "distribution" was used in the Revenue Act of 1928, it had reference to actual payment or delivery. (See Sections 112, 113 (a) (9), 115, 161, 162, 165, 167 and 182 of the Revenue Act of 1928.)

The word "distribution" was likewise used in the sense of actual payment or delivery in the Revenue Acts of 1926, 1924, 1921 and 1918.

It clearly appears from the decision of this Court in *Brewster* v. *Gage*, 280 U. S. 327, that the word "distribution," as used in § 113 (a) (5) of the Revenue Act of 1928, means delivery to the taxpayer of personal property acquired by intestacy or by general bequest. In its opinion (at page 334) this Court referred to the right of a legatee of such property "to have it delivered upon entry of the decree of distribution • • •.

The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees, and requires the administrators or executors to deliver it to them."

In the case of *McFeely* v. *Commissioner of Internal Revenue*, 296 U. S. 102 (with which five other cases[1] were decided), the Commissioner contended that the words "the time of the distribution to the taxpayer", as used in § 113 (a) (5) of the Revenue Act of 1928, meant the time of actual distribution to the taxpayer, and that until the date of such actual distribution, property could not be said to be held by the taxpayer under § 101 of the Revenue Act of 1928. It was not disputed in the *McFeely* case that the words "at the time of the distribution to the taxpayer," as used in the third sentence of § 113 (a) (5) of the 1928 Revenue Act, meant the date of actual distribution to the taxpayer.[2]

If, as held by the Court below, there was a distribution to the taxpayer, within the meaning of § 113 (a) (5) of the Revenue Act of 1928, when the Swift estate was closed in the Probate Court on December 11, 1905, then,

1. *First Nat. Bank of Boston, et al., Trustees under Will of Blodgett* v. *United States*, 76 F. (2d) 200 (C. C. A. 1st);
Lee v. *Commissioner of Internal Revenue*, 76 F. (2d) 203 (C. C. A. 1st);
Dibblee v. *Commissioner of Internal Revenue*, 75 F. (2d) 617 (C. C. A. 9th);
Rand v. *Helvering, Commissioner of Internal Revenue*, 79 F. (2d) 24 (C. C. A. 8th);
Ogle v. *Helvering, Commissioner of Internal Revenue*, 77 F. (2d) 338 (C. C. A. 2nd).

2. In deciding the McFeely case, the Supreme Court said:
"Here the rule obtains that a taxing statute, if of doubtful intent, should be construed favorably to the taxpayer: (Citing *Crooks* v. *Harrelson*, 282 U. S. 55, 61).
"To depart from the literal meaning of § 101 (c) (8) would be to penalize the taxpayer by lengthening the period during which the capital asset must be held in what is really a single ownership to obtain the advantage of the reduced tax. Under these circumstances we ought not to depart from the plain meaning of the section in an effort to bring about a uniformity which it is claimed Congress intended but failed to express."

during the period from January 1, 1916, to March 29, 1923, Ruth Swift Maguire would have been the taxpayer liable for the tax on *all* income derived from the property held in trust for her under the will of her father. *Such was not the case.* The testamentary trustees, themselves were the taxpayers as to income from such property during said period from January 1, 1916, to March 29, 1923, when actual distribution of the trust estate was made to Ruth Swift Maguire and her co-beneficiaries who were then surviving. During said period the revenue acts contained provisions expressly taxing to trustees income from any kind of property held in trust for future distribution under the terms of a will or trust.[3]

This being true, it could not also be true that "the time of the distribution to the taxpayer" of the properties involved herein was on December 11, 1905, when the estate of Gustavus F. Swift was closed in the Probate Court.

IV.

THE STATUTE IS CLEAR AND IS NOT AMBIGUOUS.

The Court below, in order to reach its decision, was forced to find that the express language of the statute "is not unambiguous and definite." (R. 70). In its opinion, the Court said:

> "The term 'distribution' might refer to distribution by the estate. *Jenkins* v. *Smith*, 21 F. Supp. 433; Dissenting opinion, *Commissioner* v. *Libbey*, 100 F. (2d) 458. Or it might refer to delivery by the testamentary trust. *Harbison* v. *Commissioner*, 26 B. T. A. 896; *Libbey* case, *supra*. In the light of the conflict of thought on this point, we are not con-

3. Sec. 2(b) of the Revenue Act of 1916;
First Trust and Savings Bank v. *Smietanka, Collector* (C. C. A. 7th), 268 F. 230, 233;
Merchants Loan and Trust Co., Trustee v. *Smietanka*, 255 U. S. 509.

vinced that the express language of the statute is unambiguous and definite, as counsel for taxpayer would have us believe."

This conclusion is contrary to and in direct conflict with every other authoritative construction of § 113 (a) (5) of the Revenue Act of 1928.

The First Circuit Court of Appeals, in the *Libbey* case, *supra*, said:

> "The meaning of the third clause of the statute is so plain that it does not call for construction, at least in its application to the facts of this case. 'Distribution to the taxpayer' means what it says—delivery to the taxpayer. It does not mean delivery by the executors to the trustees, where the trustees are not the taxpayer. They are not the taxpayer here."

The Second Circuit Court of Appeals, in the *Gambrill, Campbell, Knox* and *Rogers* cases, *supra*, said:

> "It is hard to imagine language which would more clearly fix the basis for computing the gain or loss realized upon the sales of the securities with which the Commissioner had to deal than the words 'fair market value of the property at the time of the distribution to the taxpayer.'"

The Third Circuit Court of Appeals, in *Haskell* v. *Commissioner*, 78 F. (2d) 869, said (at page 870):

> "The language of the statute is clear and requires no construction."

The Sixth Circuit Court of Appeals, in *Williamson* v. *Commissioner*, 100 F. (2d) 735, expressed no doubt as to the clarity of the language used when, in referring to the decision of the Board of Tax Appeals (34 B. T. A. 924), the Court said (at page 738):

> "Its determination that the date of the actual receipt of the stocks is the basis instead of the date of the order of distribution is in accord with the words of § 113 (a) (5), which expressly states that the basis shall be the 'fair market value of the property at the time of the distribution to the taxpayer.'".

On the basis of its decision in the *Williamson* case, the Sixth Circuit Court of Appeals affirmed the decision of the Board of Tax Appeals in *Taft, Trustee,* v. *Commissioner,* 101 F. (2d) 1007.

The decision of the United States District Court (Conn.) in *Jenkins, et al.* v. *Smith, Collector,* 21 F. Supp. 433, was destroyed as a precedent by the decision of the United States Circuit Court of Appeals, Second Circuit, on June 10, 1940, in the *Gambrill, Campbell, Knox* and *Rogers* cases, *supra.* Upon the appeal of *Jenkins* v. *Smith, supra,* the sole issue submitted to and decided by the Circuit Court of Appeals was that involving the service of notice and demand for tax by the Collector, such issue being referred to in the opinion of the District Court as Issue III. Inasmuch as the District Court decided that the plaintiffs, who were executors under the will of Jenkins, deceased, were entitled to recover the entire amount of the deficiency paid, for the reason that the Collector's demand and notice was not delivered to the taxpayer within ten days after receiving the assessment list, the remainder of the court's decision, holding that the word "distribution" in § 113 (a) (5) of the Revenue Act of 1932 referred to the distribution by executors to testamentary trustees and not to distribution by testamentary trustees, is dictum.

V.

THE PRINCIPLES OF STATUTORY CONSTRUCTION APPLICABLE TO THIS CASE ARE FIRMLY ESTABLISHED BY NUMEROUS DECISIONS OF THIS COURT.

In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used. It is well settled that where the language of a statute is clearly expressed there is no room for construction. *Helvering* v. *Gowran*, 302 U. S. 238, 241-242.

As this Court declared in deciding *Old Colony Railway Company* v. *Commissioner*, 284 U. S. 552, 560:

> "The rule which should be applied is established by many decisions. 'The legislature must be presumed to use words in their known and ordinary signification.' (*Levy* v. *M'Cartee*, 6 Pet. 102, 110) 'The popular or received import of words furnishes the general rule for the interpretation of public laws.' (Citing cases.) As was said in *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364, 370, * * * 'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.' This rule is applied to taxing acts; *DeGanay* v. *Lederer*, 250 U. S. 376, 381."

In *United States* v. *Merriam*, 263 U. S. 179, 187, this Court said:

> "But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government, and in favor of the taxpayer."

In *Crooks* v. *Harrelson*, 282 U. S. 55, this Court stated:

> "And there must be something to make plain the intent of Congress that the letter of the statute is

> not to prevail (citing *Treat* v. *White*, 181 U. S. 264). * * * Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with particular strictness".

In *Lucas, Commissioner* v. *Earl*, 281 U. S. 111, 114, this Court said:

> "But this case is not to be decided by attenuated subtleties. It turns on the import and reasonable construction of the taxing act."

The soundness of this established rule, in the construction of statutes levying taxes, is based upon the wide application of such statutes to large classes of citizens. If taxing statutes were to be construed by speculation, rather than by the plain import of the language used, the certainty of the revenue would be destroyed and the taxpayer forced to determine by litigation the meaning of ordinary language used by Congress. As this Court said in *White* v. *Aronson*, 302 U. S. 16, 21:

> "Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them."

Petitioner respectfully contends that the language of the applicable statute is "so plain as to need no construction". *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, 89. The intention of Congress is to be sought for primarily in the language used. *Thompson* v. *United States*, 246 U. S. 547, 551. Where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it. *Hamilton* v. *Rathbone*, 175 U. S. 414, 419.

The suggested ambiguity in the statute arises primarily through the failure of the Court below to give proper consideration and weight to the words "to the taxpayer", which are the vital part of the third sentence of § 113 (a) (5) of the Revenue Act of 1928 (Point II herein). When the phrase "distribution to the taxpayer" is considered

as a whole, it is obvious that the "distribution" to which Congress referred was the delivery of the property involved to the person who sold it and to whom the gain on such sale was to be taxed.

VI.

THE LEGISLATIVE HISTORY RELATING TO THE ENACTMENT OF § 113 OF THE REVENUE ACT OF 1928 SUSTAINS THE POSITION OF THE TAXPAYER.

The opinion of the Court below points out (R. 71) that the change in the basis date for determining gain or loss from the sale of property passing by will or intestacy, as provided in § 113 of the Revenue Act of 1928, was due to confusion as to the meaning of the term "date of acquisition" of such property by the taxpayer, which basis was prescribed by the prior Revenue Acts. Such confusion was ended by the decision of this Court in *Brewster* v. *Gage*, 280 U. S. 327, rendered January 6, 1930, affirming the decision of the Circuit Court of Appeals (2nd Circuit) on February 4, 1929, 30 F. (2d) 604.

Brewster v. *Gage, supra,* was an action brought to recover income taxes alleged to have been erroneously and illegally collected for the years 1920, 1921 and 1922. In that case the Circuit Court of Appeals (2nd Circuit) had held that the Revenue Acts of 1918 and 1921[4] should not be construed so as to render untaxable gain which had accrued during the period between the date of the death of the testator and the date of distribution to a residuary legatee, and said that if the basis for determining gain or loss on the sale of personal property acquired by general bequest or intestacy was its fair market value at the date of distribution, "that would place it within the power of

4. The Revenue Acts of 1918 (40 Stat. at L. 1057, c. 18) and 1921 (42 Stat. at L. 227, c. 136), which were applicable for the years 1920 to 1922, inclusive, provided that if the property was acquired by bequest, devise or inheritance, the basis should be the fair market value of such property at the time of such acquisition.

personal representatives and the real owners, namely, the legatees or distributees, to defer distribution in order to escape tax".

The Circuit Court of Appeals (2nd) further held (at p. 605) that the date of *acquisition* did not mean the date of *distribution,* because "It surely was not the intent of Congress that the acquisition of a mere legal title should completely wipe out or render untaxable the gain which had been acquired by the equitable ownership, and which was, in fact, realized upon the sale when the date of distribution arrived". In affirming the decision of the Circuit Court of Appeals (2nd Circuit) in *Brewster* v. *Gage, supra,* this Court pointed out that the Revenue Act of 1928, § 113 (a) (5), "expressly established value at the time of the death of the decedent as the basis of calculation in respect of sales of personal property acquired by specific bequest and of real estate acquired by general or specific devise or by intestacy, and in all other cases fixed fair market value at the time of distribution to the taxpayer as the basis. 45 Stat. at L. 819, chap. 852, U. S. C. title 26, § 2113. The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended." References in House Report No. 704[5] and in Senate Report No. 558[6] to the decision of this Court in *Brewster* v. *Gage, supra,* show that Congress, had full knowledge of such decision when, on June 6, 1932, it re-enacted without change said § 113 (a) (5) of the Revenue Act of 1928, which fixed the basis of personal property acquired by general bequest or inheritance as its fair market value at the time of the distribution to the taxpayer.

In recommending the re-enactment in 1934 of the provision contained in the 1926 Act, which fixed value at

5. 73rd Cong., 2nd Sess., Int. Rev., Cum. Bul. 1939-1 (Part 2) pp. 554, 575.
6. 73rd Cong., 2nd Sess., Int. Rev., Cum. Bul. 1939-1 (Part 2) pp. 586, 612.

"the date of acquisition" as the basis, both the House and the Senate Committees said:

> "the change in the 1928 Act was made because there was some doubt as to the meaning of the term 'date of acquisition', which was the term used under the Revenue Act of 1926";

and that since the 1928 Act was passed, the Supreme Court had defined the term "date of acquisition" to mean the date of death in the case of all property passing by bequest, devise and inheritance, whether real or personal. The Committees then recommended that § 113 (a) (5) of the 1934 Bill should conform to the language contained in the 1926 Act, so that a uniform basis rule might be required in the case of property passing at death, whether real or personal.

It is seen that the change in the 1934 Act was not made because "some evils had appeared", as stated by the Court below (R. 72), but because all doubt as to the meaning of the words "date of acquisition" had been removed by the decision of this Court in *Brewster* v. *Gage, supra.*

Convincing proof that Congress, by the third sentence of § 113 (a) (5) of the 1928 and 1932 Revenue Acts, did not intend to tax all increment in value is found in the provision that the basis for determining gain or loss on the sale of personal property acquired by general bequest or intestacy is the value thereof "at the time of the distribution to the taxpayer", since the date of distribution must be subsequent to the death of the decedent. Concerning this, there is no dispute, but Respondent contends that Congress must have intended that only a minimum amount of increment should escape taxation and that, therefore, the word "distribution", as used in § 113 (a) (5) of the 1928 Revenue Act, should be construed to mean something different than it means in every other section of the Act.

The Court below accepted such contention, because (as the Court said) the Senate Finance Committee, in recommending enactment of the Revenue Act of 1934 (Senate Report No. 558[7]), expressed no concern over a construction of the word "distribution" which would permit "avoidance of tax gains accruing between death and distribution by the trustee" to the taxpayer. The Court concluded, therefore, that Congress, in enacting the 1928 and 1932 Revenue Acts, did not look beyond the "distribution by the estate" (R. 73).

At the time Congress was considering the enactment of the Revenue Act of 1934, the Commissioner of Internal Revenue was holding that the term "at the time of the distribution to the taxpayer", in the case of distribution by a testamentary trust, meant at the time of the delivery to the taxpayer.

House Report No. 704, *supra*, was made on February 12, 1934. On August 29, 1932, the United States Board of Tax Appeals, in construing § 113 (*a*) (5) of the Revenue Act of 1928, had held that the term "at the time of the distribution to the taxpayer" meant at the time of the delivery to the taxpayer (*Ralph W. Harbison* v. *Commissioner*, 26 B. T. A. 896). The decision of the Board of Tax Appeals in the *Harbison* case was acquiesced in by the Commissioner of Internal Revenue in 1933 (G. C. M. 11309, Internal Revenue, C. B. XII-1, 126), *and it was not until 1935* that the Commissioner withdrew such acquiescence and issued General Counsel's Memorandum 14893 (Internal Revenue, C. B. XIV-1, 202), which asserted that the term "at the time of the distribution to the taxpayer", as used in the 1928 and 1932 Revenue Acts, meant "at the time of the distribution from the estate".

It is entirely illogical to reason that the members of the

7. 73rd Cong., 2nd Sess., Int. Rev., Cum. Bul. 1939-1 (Part 2) pp. 586, 612.

Congressional Committees, when considering the proposed 1934 Revenue Act, were unaware of the administrative rulings of the Commissioner in force at the time, which permitted the escape from taxation of the increment in value accruing between the date of the closing of an estate and the date of the delivery to the taxpayer. Nevertheless, the Court below concluded that Congress, at the time of enacting the 1934 Revenue Act, was unaware that the word "distribution" refers to "delivery" and that, therefore, in enacting the Revenue Acts of 1928 and 1932, "Congress was not looking beyond the distribution by the estate, when it wrote the language in controversy" (R. 73).

The conclusion of the Court below is not drawn from anything that the legislators said, but is drawn wholly from the failure of the Congressional Committees to refer to their undoubted knowledge of the administrative rulings of the Commissioner. Such conclusion demonstrates the fallacy of statutory construction by speculation rather than by the clear import of the language used.

VII.

PROPERTY PURCHASED BY TESTAMENTARY TRUSTEES AND DISTRIBUTED TO THE TAXPAYER WAS ACQUIRED BY THE TAXPAYER BY WILL.

The Court below held, in effect, that the property *purchased by the executors* under the will of Gustavus F. Swift and turned over to themselves as testamentary trustees, and which was later delivered in kind to the taxpayer and her co-beneficiaries, was "property transmitted at death" and "acquired by will" (R. 72, 73); but that the property *purchased by the testamentary trustees* and distributed to said beneficiaries was not "property transmitted at death * * * that it was acquired by purchase and not 'by will'" (R. 74).

Beginning with the 1916 Revenue Act, Congress has uniformly treated executors and trustees as fiduciaries, and there is nothing whatever in the language of the Revenue Act of 1928, or in the Congressional Reports relating to any Revenue Act, which indicates that Congress intended to discriminate between such fiduciaries. Congress, when passing the Revenue Act of 1928, construed the third sentence of § 113 (a) (5) as applying in cases where the executor purchases property and distributes it to a beneficiary. It inevitably follows that Congress intended that the third sentence of said section should also apply in cases where testamentary trustees purchase property and distribute it to a beneficiary.

The Senate Finance Committee, in its report No. 960[8] upon the Revenue Bill of 1928, stated:

> "the House Bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property."

The Senate Finance Committee, therefore, revised § 113 (a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty or the transmission of realty by intestacy, the basis should be the fair market value at the time of the death of the decedent and stated:

> "The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific

8. 70th Cong., 1st Sess., Int. Rev., Cum. Bul. 1939-1 (Part 2) pp. 409, 427.

bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary."

The Conference Committee, in its report upon the Revenue Bill of 1928 (Report No. 1882[9]), adopted the Senate Finance Committee's revision of § 113 (a) (5).

The Court below placed undue emphasis upon the words "Property Transmitted at Death" which are a subheading of § 113 (a) of the 1928 Revenue Act, relating to personal property acquired by specific bequest or intestacy, real property acquired by general or specific devise, and to "all other cases if the property was acquired either by will or by intestacy." But the title of an act cannot limit the plain meaning of its text. *Strathearn S. S. Co.* v. *Dillon,* 252 U. S. 348, 354. As stated by this Court in *Caminetti* v. *United States,* 242 U. S. 470, 490:

> "* * * the name given to an act by way of designation or description or the report which accompanies it, cannot change the plain import of its words. If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.
>
> "Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation. But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to, or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd, or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent."

9. 70th Cong., 1st Sess., Int. Rev., Cum. Bul. 1939-1 (Part 2) pp. 444, 447.

The question is whether the property involved herein was "acquired by will". In the case of *Fleming* v. *Commissioner*, 36 B. T. A. 773, the contention of the Commissioner of Internal Revenue that securities purchased by testamentary trustees and by them distributed to residuary legatees under a will was property "acquired by will" was sustained. The Board of Tax Appeals said (at page 777):

> "It may well be that these securities were purchased by the testamentary trust, and that the title to them was then acquired by petitioner, remainderman. (Citations) However, our immediately pertinent question is not *when* but *how* the petitioner, remainderman under the will of her father, not the trustee, acquired these securities. * * * the testamentary trustee was not the agent of petitioner, the remainderman. The trustee was the creature of the decedent, made so by his will. It was thus designated as the continuing instrumentality of the decedent to execute his and not the will of the petitioner, remainderman. She neither controlled the terms of the trust nor its *res* until distributed to her. All she had before that distribution was a right to share therein in accordance with the terms of the testamentary trust, the right to which vested in her at the death of decedent. (Citations) Thus, it was by virtue of the provisions of the testamentary trust created by the will of her father, that petitioner was the remainderman under that trust and received the securities in question. They may have been purchased by the trustee, but the petitioner acquired them by will."

In the case of *Commissioner* v. *Gambrill, supra,* the United States Circuit Court of Appeals (2nd Circuit) held (at page 533) that any property distributed by a testamentary trustee, which is part of the corpus of the trust, "is acquired through and by virtue of the will. Through the will the remaindermen derived all their interests and without it they would have had no standing and would have received nothing." The Court cited *Lyeth* v. *Hoey,*

305 U. S. 188, where this Court held that the value of property received by an heir from the estate of a decedent, in compromise of his claim that the decedent's will was invalid, was property acquired by inheritance within the meaning of the Federal income tax law.

In the case of *Richard J. Reynolds* v. *Commissioner of Internal Revenue,* decided October 7, 1940, by the United States Circuit Court of Appeals (4th Circuit), the Court held that securities purchased by a testamentary trustee under the will of R. J. Reynolds, taxpayer's father, and by said trustee distributed to the taxpayer, Richard J. Reynolds, constituted property "acquired by bequest, devise or inheritance" within the meaning of § 113 (a) (5) of the Act of 1934. In so deciding, the Court stated:

> "In our opinion, § 113 (a) (5) of the Act covers securities purchased by the trustee in the administration of the estate and distributed to the taxpayer, as well as securities received by the trustee from the decedent's estate and similarly distributed. Obviously, the will of R. J. Reynolds was the source of the taxpayer's acquisition in both cases. We are in accord with the views expressed upon a similar question under the Revenue Act of 1928 in *Commissioner* v. *Gambrill,* 2 Cir., 112 F. 2d 530, 533."

The undisputed and controlling fact in this case is that the property here involved was acquired by the taxpayer, Ruth Swift Maguire, "through and by virtue of the will" of Gustavus F. Swift. *Commissioner* v. *Gambrill, supra.* Ruth Swift Maguire and her co-beneficiaries under their father's will did not purchase any of the securities involved in this case. The title of taxpayer and her co-beneficiaries to such securities rests entirely in their father's will. Having thus acquired by will the securities purchased by the testamentary trustees and distributed to the taxpayer, the basis for computing taxpayer's gain upon the sale by her of such securities is "the fair market

value of the property at the time of the distribution to the taxpayer'' on March 29, 1923.

CONCLUSION.

The property involved in this case was personal property ''acquired by will'' by general bequest. It was distributed to the taxpayer, Ruth Swift Maguire, on March 29, 1923, and was sold by her in 1929 and 1930. The proper basis for determining taxpayer's gain, for income tax purposes, on the sale of such property, is the fair market value thereof on March 29, 1923, which was ''the time of the distribution to the taxpayer.'' The decision of the United States Circuit Court of Appeals (7th Circuit) should be reversed.

Respectfully submitted,

ALBERT H. VEEDER,
FRANCIS E. BALDWIN,
33 South Clark Street,
Chicago, Illinois,
Attorneys for Petitioners.

APPENDIX.

APPLICABLE STATUTE.

Revenue Act of 1928, c. 852, 45 Stat. at L. 791:

SEC. 111. *Determination of Amount of Gain or Loss.*

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

SEC. 113. *Basis for Determining Gain or Loss.*

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * *

(5) *Property Transmitted at Death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death;

(b) *Property acquired before March 1, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:

(1) the cost of such property (or, in the case of such

property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or

(2) the fair market value of such property as of March 1, 1913, which ever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

SEC. 701. *Definitions.*

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

* * * * * *

(13) The term "taxpayer" means any person subject to a tax imposed by this Act.

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